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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 41

SAM UMANS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

~~MOTION FOR LEAVE TO FILE AND~~ PETITION FOR REHEARING OF ORDER DISMISSING WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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Motion for Leave to File Petition for Rehearing.

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court entered on November 6, 1967 dismissing as improvidently granted the petition for writ of certiorari in this case entered on February 27, 1967. Rehearing is sought to present other substantial grounds available to petitioner but not previously presented, to wit: that the Court below erred in refusing to inspect the grand jury minutes upon petitioner's showing that none of the witnesses who testified before trial testified before the grand jury that indicted petitioner. This raises the broad question of what showing

of insufficiency of evidence before the grand jury must be made to obtain an inspection of the grand jury minutes either in camera or by petitioner. This question also is raised in *Brown* v. *United States*, petition for cert. filed 35 U.S.L. Week 3377 (Apr. 14, 1967) (No. 1270, 1966 Term, renumbered No. 88, 1967 Term), but has not yet been decided by this Court.

We respectfully urge that the Court below abused its discretion in refusing to inspect the grand jury testimony, and request the Court to consider that question or to remand the case to the lower court with instructions to make the grand jury testimony part of the record and to consider petitioner's motion to quash the indictment in the light of that testimony.

Dated: November 1967.

EDWARD BRODSKY,
Counsel for Petitioner.

PETITION FOR REHEARING OF ORDER DISMISSING THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

Petitioner prays that this Court grant rehearing of its order of November 6, 1967 dismissing the writ of certiorari as improvidently granted and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit.

Reasons for Granting Rehearing and Issuing the Writ

The first question in the petition for writ of certiorari filed by petitioner and granted by this Court, and the first question in petitioner's brief filed on the merits, was whether or not a government agent's brief summary of portions of witnesses' affidavits, being the entire grand jury testimony, was sufficient evidence to support an indictment. The grand jury testimony was not a part of the record in the Court below.' Petitioner knew the content of the grand jury testimony only from a statement in the Government's brief in the Court of Appeals and from statements made in the Government's brief on the merits in this Court. Petitioner, without presenting the point to this Court, assumed that a statement in the Government's brief would be sufficient to have the point considered by this Court, c.f. *Mesarosh* v. *United States*, 352 U. S. 1, 3 (1956) and did not ask this Court to grant certiorari on that point. Petitioner briefed the grand jury point on the merits in this Court assuming that the Government's characterization of evidence before the grand jury was sufficient to raise the point. Petitioner also briefed on the merits the three other points on which the Court granted cer-

tiorari.[1] There was no suggestion from the Government or from the Court in any of the questions on oral argument that certiorari had been improvidently granted. Nevertheless, the Court dismissed the writ of certiorari.

Thus, the question of whether or not it was error under the circumstances of this case, for the Court below to refuse to inspect the grand jury minutes has not been previously presented to this Court and we respectfully urge this Court to grant a writ of certiorari on that question.

In the Court below, petitioner asked each witness whether or not he testified before the grand jury that indicted petitioner and each witness testified that he did not appear before the grand jury that indicted petitioner (R. 106a). Because no witnesses who appeared at the trial testified before the grand jury, petitioner demanded to inspect the grand jury testimony or at least to have the Court inspect the grand jury testimony in order to determine what, if any, evidence the grand jury heard to support the indictment (*Ibid.*). The Court below denied petitioner's request (*Ibid.*).

It may be argued that despite the Government's characterization of the grand jury testimony in its briefs, the

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[1] The four points in the petition for writ of certiorari granted by this Court were the following:

1. Is a Government agent's "brief summary" of witnesses' affidavits, being the entire grand jury testimony, insufficient to support an indictment?
2. Should statements of Government witnesses admitting prior illegal acts involving moral turpitude have been made available to the defense under the Jencks Act?
3. Was petitioner, who allegedly paid money to Government officials, improperly convicted of aiding and abetting violations of Title 26 U.S.C. § 7214(a)(2) which necessarily requires the acts of two persons?
4. Was petitioner improperly convicted of violations of Title 18 U.S.C. § 201(f) and, on the identical facts, for violations of Title 18 U.S.C. § 201(b) which statutes are materially inconsistent?

sole question before this Court with respect to the grand jury issue in petitioner's writ of certiorari should have been whether or not it was error for the Court below to refuse to permit petitioner to inspect the grand jury testimony. Thus, the broad question is—what showing of insufficiency of evidence before the grand jury must be made in order to obtain an inspection of the grand jury minutes so that an accused may intelligently brief and argue the point. Since the accused has no way of determining before trial the evidence upon which the indictment is founded, a showing that no witnesses who testified at the trial testified before the grand jury should always be sufficient to cause an inspection to be conducted of the grand jury minutes. This is a point which our research discloses never before has been considered or passed upon by this Court. If there are no circumstances under which an accused may compel the inspection of grand jury minutes to determine what, if any, evidence the grand jury heard to support an indictment then the Fifth Amendment right not to be indicted for an infamous crime unless on a presentment or indictment of a grand jury is illusory. With no guidelines set by this or any other Court it is impossible for an accused to know when, if ever, this Court or any other Court will consider the question of sufficiency of evidence before the grand jury. This leaves the state of the law in confusion because there are no standards to follow.

The Court of Appeals in the instant case, although refusing to quash the indictment, recognized that "excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford the innocent" (R. 146).

The question of what showing of insufficiency of evidence must be made in order to obtain an inspection of the Grand Jury minutes has been presented to the Court in the peti-

tion for writ of certiorari in *Brown* v. *United States, supra.* There, the question presented is, "Whether an indictment is sufficient if the only evidence before the Grand Jury is the hearsay testimony of a government agent and the transcripts of testimony before a prior Grand Jury? And, if not, whether the trial court must examine the Grand Jury minutes to determine the indictment's sufficiency?" The petition for a writ of certiorari in *Brown* was filed on April 14, 1967 but has not yet been decided by this Court. If the petition in that case is granted, a decision in that case might control the issues presented by the Grand Jury question in this case.

We ask the Court to grant a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit. Alternatively, we request that the case be remanded to the lower court with instructions to make the Grand Jury testimony a part of the record in this case and to decide petitioner's motion to quash the indictment in the light of the Grand Jury testimony.

CONCLUSION

For the reasons set forth above, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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Counsel for Petitioner.